



## Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact [support@jstor.org](mailto:support@jstor.org).

## AUSTIN, KORKUNOV AND MR. HASTINGS— A REPLY.

It is perhaps presumptuous for me to write under the above heading when my acquaintance with the works of the authors indicated is, with the exception of Austin, a negligible quantity. While I have read with some care John Austin on Jurisprudence, my knowledge of the views of Korkunov and Mr. Hastings is practically confined to the article by the last mentioned which appears in this Review for December last.<sup>1</sup> Yet there are certain *dicta*, in the article referred to, which I cannot allow to pass without comment. In particular, I wish to express a protest against the tendency to belittle the work of an author who has done more for the science of jurisprudence than any other English writer, and whose contributions to that science are still in my opinion indispensable to the student of legal theory. It is not, at least so I am impelled to believe, by rejecting Austin but by utilising him, that we shall make real advance towards a truly scientific conception of the nature of law.

Mr. Hastings' general argument involves several fallacies. In the first place he ignores the enormously important part which has been played in the past, and is still played, by force as a means of drilling men into social beings. In the second place, he does not appear to recognise that the judge and the policeman are none the less instruments of social might because the law which they enforce may express a popular will. In the third place, he ignores the value and importance of force as a means to social discipline save in so far as the force is actually employed. He asks if the uniformity resulting through legal adjustments is brought about as the result of physical constraint. "Cases of the actual use of force are insignificant in comparison with the whole mass regulated." Quite true; but the fact is irrelevant to the determination of the precise degree of importance to be attached to the legal sanction. Moreover, I am not aware that Austin anywhere states that force, or even the fear of force, is mainly responsible for the observance of legal rules. On the contrary, when he seeks to explain the fact of habitual obedience to government, he finds the explanation in the power of custom and prejudice and in the popular perception of the utility of government.

---

<sup>1</sup>W. G. Hastings, Law and Force, 10 COLUMBIA LAW REVIEW 740.

Mr. Hastings' criticisms are somewhat belated. Writing about thirty years ago, Professor Lawrence in his *Essays on International Law*, predicted the decreasing importance of the element of force in the complex conception of law. The prediction was quite in accord with the individualistic tradition. But the growth of collectivism, with its increasing subordination of the individual will to the will of the State, has invested the element of force with a new importance. The force is not arbitrary, since it is exercised according to rule; it is not autocratic, since it is imposed through the agency of institutions which express more or less approximately the popular will; and, finally, it is less subordinated to the sinister interest of a class. But it is force nevertheless. The characteristic feature of the social progress of our time has been the widening of the sphere of state activity, the enlargement of the area within which rules of conduct, instead of being enforced by the controlling influence of public opinion, are maintained by the might of the State. The goal of civilisation in the near future I take to be, not the abandonment of force, but its moralisation.

Mr. Hastings is much perturbed by the anarchist. "The social use just now made of the theory that all law rests on force, and that force is law's essential attribute, is to help the anarchist and to retard real social progress." It appears to me that the author much exaggerates the influence of anarchist doctrine, while failing to realize the sources of that influence—such as it is. What gives vitality to the anarchist movement is not any juristic theory but the social injustice for which governments can be held, directly or indirectly, responsible.<sup>2</sup> The real answer to the anarchist must be found, not in improved theories about the nature of government, but in an active and far reaching policy of social reform. Of course the jurist who represents law as "a mere expression of brute force" makes the case for anarchy appear the stronger. But Austin was not guilty of so crude a blunder. On the other hand, the jurist who fails to recognize the practical necessities which justify the application of force by organized society, or maintains that law can be upheld without force, is at once juggling with facts and playing into the hands of the anarchist whom he may be professing to refute.

Let me take the war for a moment into the enemy's camp.

---

<sup>2</sup>*Cf.* article by the present writer in the *Hibbert Journal*, July, 1910, "The Message of Anarchy."

How does Mr. Hastings distinguish between law and positive morality? He proposes two tests. (1) The recognition of rules by accredited representatives of society. But, we are impelled to ask, what is the practical meaning of that recognition? The citizen is interested, not in the mere fact of the recognition, but in what the recognition implies—that a particular rule of conduct is taken within the sphere where the power of the State can be relied upon to secure the desired conformity. (2) "The rules which have to do merely with morals relate to individual character and conduct. The rules of law govern social action and the realisation of interests." Could anything be more hopeless than an attempt to distinguish between law and morality on these lines? When is action social? Can it be pretended for a moment that all social action comes, or ought to come, within the controlling influence of positive law?

Mr. Hastings frequently quotes Korkunov. As I have already confessed, I have not read that author's work on the General Theory of Law. But if the extracts in Mr. Hastings' article are a fair sample, I do not seem to have missed much. One illustration will suffice. Korkunov is maintaining that "constraint is neither a fundamental, nor even a general, attribute of juridical phenomena." He urges in defence of this conclusion that we can conceive of law without constraint. "If society were composed only of perfect men, constraint would be superfluous and unknown." No doubt; but in the meantime, it would be wise to recognise that man is not perfect; and that his imperfections have to be taken into account in determining the real significance of existing institutions.

In conclusion, I return to my starting point. There has been for some time so much sneering at Austin's work that it appears to me timely to utter a word of protest. No doubt Austin's analysis is inadequate. He does not grasp, for example, the significance of the fact that the Ruler is an organ of an organised society, and that the Ruler's will is therefore an expression of a general will. We need, as T. H. Green pointed out, to combine the analysis of Austin with that of Rousseau. It remains nevertheless true that Austin's *Province of Jurisprudence Determined* is an enduring contribution to the literature of the subject. For clearness of thought, for vigor of analysis, for the power to stimulate the thinking power of a student, Austin's work is unsurpassed by that of any English jurist. It is true that in his

analysis the element of force assumes an undue importance; but we shall learn to do better than Austin, not by discarding the results of his labors, but by correcting those results. Beyond Austin, no doubt, but through Austin, lies the way of progress in the near future.

W. JETHRO BROWN.

THE UNIVERSITY OF ADELAIDE.